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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 IN RE:

MDL Docket No 06-1791 VRW

9 NATIONAL SECURITY AGENCY
10 TELECOMMUNICATIONS RECORDS
11 LITIGATION

ORDER

12 This order pertains to:

13 Al-Haramain Islamic Foundation et
14 al v Bush et al (C 07-0109 VRW),
15 _____/

16 On November 16, 2007, the court of appeals remanded this
17 case for this court to consider whether the Foreign Intelligence
18 Surveillance Act, 50 USC §§ 1801-71, ("FISA") "preempts the state
19 secrets privilege and for any proceedings collateral to that
20 determination." Al-Haramain Islamic Foundation, Inc v Bush, 507
21 F3d 1190, 1206 (9th Cir 2007). This court entertained briefing and
22 held a hearing on that issue and, on July 2, 2008, issued a ruling
23 that: (1) FISA preempts the state secrets privilege in connection
24 with electronic surveillance for intelligence purposes and would
25 appear to displace the state secrets privilege for purposes of
26 plaintiffs' claims; and (2) FISA did not appear to provide
27 plaintiffs with a viable remedy unless they could show that they
28 were "aggrieved persons" within the meaning of FISA. In re

1 National Security Agency Telecommunications Records Litigation, 564
 2 F Supp 2d 1109, 1111 (N D Cal 2008). The court dismissed the
 3 complaint with leave to amend. Plaintiffs timely filed an amended
 4 pleading (Doc #458/35¹) and defendants, for the third time, moved
 5 to dismiss (Doc #475/49). Plaintiffs simultaneously filed a motion
 6 to "discover or obtain material relating to electronic
 7 surveillance" under 50 USC § 1806(f) (Doc #472/46), which
 8 defendants oppose (Doc #496/50).

9 This pair of cross-motions picks up, at least in theory,
 10 where the court's July 2, 2008 order left off. At issue on these
 11 cross-motions is the adequacy of the first amended complaint (Doc
 12 #35/458) ("FAC") to enable plaintiffs to proceed with their suit.
 13 Accordingly, the court's discussion will address the motions
 14 together.²

I

16 As with the original complaint, plaintiffs are the Al-
 17 Haramain Islamic Foundation, Inc, an Oregon non-profit corporation
 18 ("Al-Haramain Oregon"), and two of its individual attorneys,
 19 Wendell Belew and Asim Ghafoor, both United States citizens
 20 ("plaintiffs"). Plaintiffs sue generally the same defendants but
 21 replace one office-holder with his replacement, make minor
 22 punctuation and wording changes and specify that they are suing one
 23

24
 25 ¹ Documents will cited both to the MDL docket number (No M 06-
 26 1791) and to the individual docket number (No C 07-0109) in the
 following format: Doc #xxx/yy.

27 ² These motions do not implicate the recent amendments to FISA
 28 enacted after the July 2 order (FISA Amendments Act of 2008, Pub L No
 110-261, 122 Stat 2436 (FISAAA), enacted July 10, 2008).

1 defendant in both his official and personal capacities: "George W
2 Bush, President of the United States, National Security Agency and
3 Keith B Alexander, its Director; Office of Foreign Assets Control,
4 an office of the United States Treasury, and Adam J Szubin, its
5 Director; Federal Bureau of Investigation and Robert S Mueller,
6 III, its Director, in his official and personal capacities"
7 ("defendants").

8 The FAC retains the same six causes of action as the
9 original complaint. First, plaintiffs allege a cause of action
10 under FISA that encompasses both a request, under 50 USC § 1806(g),
11 for suppression of evidence obtained through warrantless electronic
12 surveillance and a claim for damages under § 1810. Doc #458/35 at
13 14. Then, plaintiffs allege violations of the following
14 Constitutional provisions: the "separation of powers" principle
15 (i e, that the executive branch has exceeded its authority under
16 Article II); the Fourth Amendment through warrantless surveillance
17 of plaintiffs' electronic communications; the First Amendment
18 through warrantless surveillance, impairing plaintiffs' "ability to
19 obtain legal advice, to freely form attorney-client relationships,
20 and to petition the government * * * for redress of grievances
21 * * *"; and the Sixth Amendment through surveillance of plaintiffs'
22 electronic communications without probable cause or warrants. Id
23 at 14-15. And finally, plaintiffs allege violations of the
24 International Covenant on Civil and Political Rights. Id at 15-16.

25 In drafting the FAC, plaintiffs have greatly expanded
26 their factual recitation, which now runs to ten pages (id at 3-12),
27 up from a little over one page. The FAC recites in considerable
28 detail a number of public pronouncements of government officials

1 about the Terrorist Surveillance Project ("TSP") and its
2 surveillance activities as well as events publicly known about the
3 TSP including a much-publicized hospital room confrontation between
4 former Attorney General John Ashcroft and then-White House counsel
5 (later Attorney General) Alberto Gonzales (id at 5).

6 Of more specific relevance to plaintiffs' effort to
7 allege sufficient facts to establish their "aggrieved person"
8 status, the FAC also recites a sequence of events pertaining
9 directly to the government's investigations of Al-Haramain Oregon.
10 A slightly abbreviated version of these allegations follows:

11 On August 1, 2002, Treasury Department Deputy Secretary
12 Kenneth W Dam testified in Congress that, in October of 2001, the
13 Treasury Department created "Operation Green Quest" to track
14 financing of terrorist activities, one of the targets of which were
15 foreign branches of the Saudi Arabia-based Al-Haramain Islamic
16 Foundation. ¶ 24.

17 On March 4, 2004, FBI Counterterrorism Division Acting
18 Assistant Director Gary M Bald testified in Congress that: in April
19 of 2002, the FBI created its Terrorist Financing Operations Section
20 (TFOS); on May 13, 2003, through a Memorandum of Understanding
21 between the Department of Justice and the Department of Homeland
22 Security, the FBI was designated as the lead Department to
23 investigate potential terrorist-related financial transactions; the
24 TFOS acquired, analyzed and disseminated classified electronic
25 intelligence data, including telecommunications data from sources
26 in government and private industry; TFOS took over the
27 investigation of Al-Haramain Islamic Foundation "pertaining to
28 terrorist financing"; on February 18, 2004, the FBI executed a

1 search warrant on plaintiff Al-Haramain Oregon's office in Ashland,
2 Oregon; and TFOS provided operational support, including document
3 and data analysis, in the investigation of plaintiff Al-Haramain
4 Oregon. ¶ 25. Bald's March 4, 2004 testimony included no mention
5 of purported links between plaintiff Al-Haramain Oregon and Osama
6 bin-Laden. ¶ 26.

7 On September 25, 2003, FBI Deputy Director John S Pistole
8 testified in Congress that the TFOS "has access to data and
9 information" from "the Intelligence Community" and has "[t]he
10 ability to access and obtain this type of information in a time
11 sensitive and urgent manner." ¶ 27.

12 On June 16, 2004, OFAC Director R Richard Newcomb
13 testified in Congress that in conducting investigations of
14 terrorist financing, OFAC officers use "classified * * *
15 information sources." ¶ 28.

16 On July 26, 2007, defendant Mueller testified before the
17 House Judiciary Committee that in 2004 the FBI, under his
18 direction, undertook activity using information produced by the NSA
19 through the warrantless surveillance program.

20 On February 19, 2004, the Treasury Department issued a
21 press release announcing that OFAC had blocked Al-Haramain Oregon's
22 assets pending an investigation of possible crimes relating to
23 currency reporting and tax laws; the document contained no mention
24 of purported links between plaintiff Al-Haramain Oregon and Osama
25 bin-Laden. ¶¶ 30-31.

26 Soon after the blocking of plaintiff Al-Haramain Oregon's
27 assets on February 19, 2004, plaintiff Belew spoke by telephone
28 with Soliman al-Buthi (alleged to be one of Al-Haramain Oregon's

1 directors) on the following dates: March 10, 11 and 25, April 16,
2 May 13, 22 and 26, and June 1, 2 and 10, 2004. Belew was located
3 in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia.
4 During the same period, plaintiff Ghafoor spoke by telephone with
5 al-Buthi approximately daily from February 19 through February 29,
6 2004 and approximately weekly thereafter. Ghafoor was located in
7 Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. (The
8 FAC includes the telephone numbers used in the telephone calls
9 referred to in this paragraph.) ¶¶ 34-35.

10 In the telephone conversations between Belew and al-
11 Buthi, the parties discussed issues relating to the legal
12 representation of defendants, including Al-Haramain Oregon, named
13 in a lawsuit brought by victims of the September 11, 2001 attacks.
14 Names al-Buthi mentioned in the telephone conversations with
15 Ghafoor included Mohammad Jamal Khalifa, who was married to one of
16 Osama bin-Laden's sisters, and Safar al-Hawali and Salman al-Auda,
17 clerics whom Osama bin-Laden claimed had inspired him. In the
18 telephone conversations between Ghafoor and al-Buthi, the parties
19 also discussed logistical issues relating to payment of Ghafoor's
20 legal fees as defense counsel in the lawsuit. Id.

21 In a letter to Al-Haramain Oregon's lawyer Lynne Bernabei
22 dated April 23, 2004, OFAC Director Newcomb stated that OFAC was
23 considering designating Al-Haramain Oregon as a Specially
24 Designated Global Terrorist (SDGT) organization based on
25 unclassified information "and on classified documents that are not
26 authorized for public disclosure." ¶ 36. In a follow-up letter to
27 Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was
28 considering "classified information not being provided to you" in

1 determining whether to designate Al-Haramain Oregon as an SDGT
2 organization. ¶ 37. On September 9, 2004, OFAC declared plaintiff
3 Al-Haramain Oregon to be an SDGT organization. ¶ 38.

4 In a press release issued on September 9, 2004, the
5 Treasury Department stated that the investigation of Al-Haramain
6 Oregon showed "direct links between the US branch [of Al-Haramain]
7 and Usama bin Laden"; this was the first public claim of purported
8 links between Al-Haramain Oregon and Osama bin-Laden. ¶¶ 39-40.

9 In a public declaration filed in this litigation dated
10 May 10, 2006, FBI Special Agent Frances R Hourihan stated that a
11 classified document "was related to the terrorist designation" of
12 Al-Haramain Oregon.

13 On October 22, 2007, in a speech at a conference of the
14 American Bankers Association and American Bar Association on money
15 laundering, the text of which appears on the FBI's official
16 Internet website, FBI Deputy Director Pistole stated that the FBI
17 "used * * * surveillance" in connection with defendant OFAC's 2004
18 investigation of Al-Haramain Oregon but that "it was the financial
19 evidence" provided by financial institutions "that provided
20 justification for the initial designation" of Al-Haramain Oregon.
21 ¶¶ 42-43. A court document filed by the United States Attorney for
22 the District of Oregon on August 21, 2007 referred to the February
23 19, 2004 asset-blocking order as a "preliminary designation" and
24 the September 9, 2004 order as "a formal designation." ¶ 44.

25 To allege that the above-referenced telecommunications
26 between al-Buthi and plaintiffs Belew and Ghafoor were wire
27 communications and were intercepted by defendants within the United
28 States, plaintiffs cite in their FAC several public statements by

1 government officials, including: July 26, 2006 testimony by
2 defendant Alexander and CIA Director Michael Hayden that
3 telecommunications between the United States and abroad pass
4 through routing stations located within the United States from
5 which the NSA intercepts such telecommunications; May 1, 2007
6 testimony by Director of National Intelligence Mike McConnell that
7 interception of surveilled electronic communications between the
8 United States and abroad occurs within the United States and thus
9 requires a warrant under FISA; September 20, 2007 testimony by
10 McConnell testified before the House Select Intelligence Committee
11 that "[t]oday * * * [m]ost international communications are on a
12 wire, fiber optical cable," and "on a wire, in the United States,
13 equals a warrant requirement [under FISA] even if it was against a
14 foreign person located overseas." ¶ 48a-c.

15 A memorandum dated February 6, 2008, to defendant Szubin
16 from Treasury Department Office of Intelligence and Analysis Deputy
17 Assistant Secretary Howard Mendelsohn, which was publicly disclosed
18 during a 2005 trial, acknowledged electronic surveillance of four
19 of Al-Buthi's telephone calls with an individual unrelated to this
20 case on February 1, 2003. ¶ 51.

21 In support of their motion under § 1806(f), plaintiffs
22 submit evidence substantiating the allegations of their FAC. In
23 addition to numerous documents drawn from United States government
24 websites and the websites of news organizations (Exhibits to Doc
25 #472-1/46-1, passim), plaintiffs submit the sworn declarations of
26 plaintiffs Wendell Belew and Asim Ghafoor attesting to the
27 specifics and contents of the telephone conversations described in
28 paragraphs 32 and 33 of the FAC. Doc ##472-6/46-6, 472-7/46-7.

II

Defendants' papers attack the sufficiency of plaintiffs' allegations in their FAC and the evidence presented in their motion under § 1806(f) to establish that they are "aggrieved persons" under FISA and thereby have standing to utilize the special procedures set forth in § 1806(f) of FISA to investigate the alleged warrantless surveillance and to seek civil remedies under § 1810. An "aggrieved person" under FISA is defined in 50 USC §1801(k) as the "target of an electronic surveillance" or a person "whose communications or activities were subject to electronic surveillance." Defendants contend that "nothing in the [FAC] comes close to establishing that plaintiffs are 'aggrieved persons' under FISA and thus have standing to proceed under Section 1806(f) to litigate any claim." Doc #475/49 at 6.

Plaintiffs' motion, by contrast, asserts that the FAC presents "abundant unclassified information demonstrating plaintiffs' electronic surveillance in March and April of 2004" and, on that basis, seeks a determination of "aggrieved person" status under FISA. Plaintiffs also "propose several possible security measures by which plaintiffs can safely be given access to portions of" the classified document that was accidentally revealed to plaintiffs during discovery and returned under orders of the Oregon District Court (the "Sealed Document") and which has been the subject of considerable attention in this litigation. Doc #472/46 at 5-6.

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A

Both FISA sections under which plaintiffs seek to proceed, §§ 1810 and 1806(f), are available only to "aggrieved persons" as defined in 50 USC § 1801(k). The court's July 2 order discussed the lack of precedents under FISA and devoted considerable space to opinions applying 18 USC § 3504(a)(1), governing litigation concerning sources of evidence. 564 F Supp 2d at 1133-35. The Ninth Circuit's standards under § 3504(a)(1), while not directly transferrable to FISA, appear to afford a source of relevant analysis to use by analogy in interpreting FISA, subject to that statute's national-security-oriented context:

The flexible or case-specific standards articulated by the Ninth Circuit for establishing aggrieved status under section 3504(a)(1), while certainly relevant, do not appear directly transferrable to the standing inquiry for an "aggrieved person" under FISA. While attempting a precise definition of such a standard is beyond the scope of this order, it is certain that plaintiffs' showing thus far with the Sealed Document excluded falls short of the mark.

Plaintiff amici hint at the proper showing when they refer to "independent evidence disclosing that plaintiffs have been surveilled" and a "rich lode of disclosure to support their claims" in various of the MDL cases. ***

To proceed with their FISA claim, plaintiffs must present to the court enough specifics based on non-classified evidence to establish their "aggrieved person" status under FISA.

Id at 1135.

Defendants' opening brief (Doc #475/49) largely fails to engage with the question posed by the court, instead reiterating standing arguments made previously (at 16-17) and asserting that "the law does not support an attempt to adjudicate whether the plaintiffs are 'aggrieved persons' in the face of the Government's successful state secrets privilege assertion" (at 27-30).

1 Defendants advance one apparently new argument in this regard: that
2 the adjudication of "aggrieved person" status for any or all
3 plaintiffs cannot be accomplished without revealing information
4 protected by the state secrets privilege ("SSP"). This argument
5 rests on the unsupported assertion that "[t]he Court cannot
6 exercise jurisdiction based on anything less than the actual facts"
7 (id at 28), presumably in contrast to inferences from other facts
8 (on which defendants contend the FAC exclusively relies).
9 Defendants' position boils down to this: only affirmative
10 confirmation by the government or equally probative evidence will
11 meet the "aggrieved person" test; the government is not required to
12 confirm surveillance and the information is not otherwise available
13 without invading the SSP. In defendants' view, therefore,
14 plaintiffs simply cannot proceed on their claim without the
15 government's active cooperation — and the government has evinced
16 no intention of cooperating here.

17 Defendants' stance does not acknowledge the court's
18 ruling in the July 2, 2008 order that FISA "preempts" or displaces
19 the SSP for matters within its purview and that, while obstacles
20 abound, canons of construction require that the court avoid
21 interpreting and applying FISA in a way that renders FISA's § 1810
22 superfluous. Accordingly, the court ruled, there must be some
23 legally sufficient way to allege that one is an "aggrieved person"
24 under § 1801(k) so as to survive a motion to dismiss. Of note,
25 defendants also continue to maintain, notwithstanding the July 2
26 rulings, that the SSP requires dismissal and that FISA does not
27 preempt the SSP. They also suggest that appellate review of the
28 preemption ruling and several of the issues implicated in the

1 instant motions might be "appropriate" if the court decides to
2 proceed under § 1806(f). Doc #475/49 at 31. (Plaintiffs counter
3 that an interlocutory appeal of the preemption question would not
4 be timely. Doc #496/50 at 28).

5 Plaintiffs urge the court to adopt the Ninth Circuit's
6 prima facie approach under 18 USC § 3504(a)(1) set forth in United
7 States v Alter, 482 F2d 1016 (9th Cir 1973), that is, that a prima
8 facie case of electronic surveillance requires "evidence
9 specifically connecting them with the surveillance — i e showing
10 that they were surveilled" without requiring that they "plead and
11 prove [their] entire case." Plaintiffs further suggest that the
12 prima facie case does not require the determination of any
13 contested facts but rather is "a one-sided affair — the
14 plaintiff's side." Doc #472/46 at 20.

15 Plaintiffs also point to the DC Circuit's recent decision
16 in In Re Sealed Case, 494 F 3d 139 (DC Cir 2007), which reversed
17 the district court's dismissal of a Bivens action by a Drug
18 Enforcement Agency employee based on the government's assertion of
19 the SSP. The district court had concluded that the plaintiff's
20 unclassified allegations of electronic eavesdropping in violation
21 of the Fourth Amendment were insufficient to establish a prima
22 facie case. Id at 147. The DC Circuit upheld the dismissal as to
23 a defendant called "Defendant II" of whom the court wrote "nothing
24 about this person would be admissible in evidence at trial," but
25 reversed the dismissal as to defendant Huddle, noting that although
26 plaintiff's case "is premised on circumstantial evidence 'as in any
27 lawsuit, the plaintiff may prove his case by direct or
28 circumstantial evidence.'" Id. Plaintiffs accordingly argue that

1 circumstantial evidence of electronic surveillance should be
2 sufficient to establish a prima facie case. The court agrees with
3 plaintiffs that this approach comports with the intent of Congress
4 in enacting FISA as well as concepts of due process which are
5 especially challenging — but nonetheless especially important —
6 to uphold in cases with national security implications and
7 classified evidence.

8 Plaintiffs articulate their proposed standard, in
9 summary, as follows: "plaintiffs' burden of proving their
10 'aggrieved person' status is to produce unclassified prima facie
11 evidence, direct and/or circumstantial, sufficient to raise a
12 reasonable inference on a preponderance of the evidence that they
13 were subjected to electronic surveillance." Doc #472/46 at 19.

14 Defendants attack plaintiffs' proposed prima facie case
15 approach by suggesting, as to plaintiffs' motion, that "no court
16 has ever used Section 1806(f) in this manner" and that it would
17 "open a floodgate of litigation whereby anyone who believes he can
18 'infer' from 'circumstantial evidence' that he was subject to
19 electronic surveillance could compel a response by the Attorney
20 General under Section 1806(f) and seek discovery of the matter
21 through ex parte, in camera proceedings." Doc # 499/51 at 12-13.
22 These points are without merit.

23 The lack of precedents for plaintiffs' proposed approach
24 is not meaningful given the low volume of FISA litigation in the
25 thirty years since FISA was first enacted. It is, moreover,
26 unlikely that this court's order allowing plaintiffs to proceed
27 will prompt a "flood" of litigants to initiate FISA litigation as a
28 means of learning about suspected unlawful surveillance of them by

1 the government. And finally, the court has ruled that allegations
2 sufficient to allege electronic surveillance under FISA must be, to
3 some degree, particularized and specific, a ruling that discourages
4 weakly-supported claims of electronic surveillance. In re National
5 Security Agency, 564 F Supp 2d at 1135.

6 In Alter, the Ninth Circuit specifically noted the
7 competing considerations and special challenges for courts in cases
8 of alleged electronic surveillance:

9 We * * * seek to create a sound balance among the
10 competing demands of constitutional safeguards
11 protecting the witness and the need for orderly grand
12 jury processing. We do not overlook the intrinsic
13 difficulty in identifying the owner of an invisible
ear; nor do we discount the need to protect the
Government from unwarranted burdens in responding to
ill-founded suspicions of electronic surveillance.

14 482 F2d at 1026. The prima facie approach employed by the Ninth
15 Circuit fairly balances the important competing considerations at
16 work in electronic surveillance cases. Its stringency makes it
17 appropriate in cases arising in the somewhat more restrictive
18 litigation environment where national security dimensions are
19 present. The DC Circuit's recent use of a prima facie approach in
20 such a case underscores that this is a proper manner in which to
21 proceed. In re Sealed Case, 494 F 3d 139. It appears consistent,
22 moreover, with the intent of Congress in enacting FISA's sections
23 1810 and 1806(f).

24
25 B

26 Defendants devote considerable space to their argument
27 that plaintiffs have not established "Article III standing." E g,
28 Doc #475/49 at 17. In support of this contention, they largely re-

1 hash and re-purpose the standing arguments made in support of their
2 previous two motions to dismiss.

3 The court will limit its discussion of this issue to
4 defendants' reliance on Alderman v United States, 394 US 165
5 (1969), which they cite in all of their briefs on these motions in
6 support of their contention that plaintiffs lack standing. Doc
7 #475/49 at 17; Doc # 499/51 at 9, 10, 26 and 27; Doc #516/54 at 9.
8 In Alderman, the Supreme Court considered, in connection with legal
9 challenges brought under the Fourth Amendment, "the question of
10 standing to object to the Government's use of the fruits of illegal
11 surveillance" in criminal prosecutions. Id at 169. Explaining
12 that "[w]e adhere to * * * the general rule that Fourth Amendment
13 rights are personal rights which, like some other constitutional
14 rights, may not be vicariously asserted," the Court held that the
15 Fourth Amendment protects not only the private conversations of
16 individuals subjected to illegal electronic surveillance, but also
17 the owner of the premises upon which the surveillance occurs.
18 While the Court made mention of the then-recently-enacted Omnibus
19 Crime Control and Safe Streets Act of 1968 codified at chapter 119
20 of Title 18 of the United States Code, 18 USC §§ 2510-22 ("Title
21 III"), Alderman did not arise under Title III.

22 The footnote about standing that defendants repeatedly
23 cite on the instant motions merely amplified the statement in the
24 text of Alderman that "Congress or state legislatures may extend
25 the exclusionary rule and provide that illegally seized evidence is
26 inadmissible against anyone for any purpose," with the observation
27 that Congress had not provided for such an expansion of standing to
28 suppress illegally intercepted communications in Title III. Id at

1 175 & n9. Defendants' reliance on Alderman is somewhat baffling
2 because here, the individuals who were allegedly subjected to the
3 warrantless electronic surveillance are parties to the lawsuit and
4 are specifically seeking relief under provisions of FISA intended
5 to provide remedies to individuals subjected to warrantless
6 electronic surveillance. The disposition in Alderman further
7 undermines defendants' broader contention that only acknowledged
8 warrantless surveillance confers standing: the Court remanded the
9 cases to the district court for "a hearing, findings, and
10 conclusions" whether there was electronic surveillance that
11 violated the Fourth Amendment rights of any of the petitioners and,
12 if so, as to the relevance of the surveillance evidence to the
13 criminal conviction at issue. Id at 186.

14 The court declines to entertain further challenges to
15 plaintiffs' standing; the July 2 order (at 1137) gave plaintiffs
16 the opportunity to "amend their claim to establish that they are
17 'aggrieved persons' within the meaning of 50 USC § 1801(k)."
18 Plaintiffs have alleged sufficient facts to withstand the
19 government's motion to dismiss. To quote the Ninth Circuit in
20 Alter, "[t]he [plaintiff] does not have to plead and prove his
21 entire case to establish standing and to trigger the government's
22 responsibility to affirm or deny." 482 F2d at 1026. Contrary to
23 defendants' assertions, proof of plaintiffs' claims is not
24 necessary at this stage. The court has determined that the
25 allegations "are sufficiently definite, specific, detailed, and
26 nonconjectural, to enable the court to conclude that a substantial
27 claim is presented." Id at 1025.

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C

Defendants summarize plaintiffs' allegations thusly, asserting that they are "obviously" insufficient "under any standard":

the sum and substance of plaintiffs' factual allegations are that: (i) the [TSP] targeted communications with individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the Government blocked the assets of AHIF-Oregon based on its association with terrorist organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the phone with an officer of AHIF-Oregon in Saudi Arabia (Mr al-Buthe [sic]) about, inter alia, persons linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, [OFAC] cited the organization's direct links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-Haramain Islamic Foundation. Plaintiffs specifically allege that interception of their conversations in March and April 2004 formed the basis of the September 2004 designation, and that any such interception was electronic surveillance as defined by the FISA conducted without a warrant under the TSP.

Doc #516/54 at 12 (citations to briefs omitted).

The court does not find fault with defendants' summary but disagrees with defendants' sense of the applicable legal standard. Defendants seem to agree that legislative history and precedents defining "aggrieved person" from the Title III context may be relevant to the FISA context (Doc #475/49 at 17 n 3), but argue that "Congress incorporated Article III standing requirements in any determination as to whether a party is an 'aggrieved person' under the FISA" (Doc #516/54 at 7) and assert that "the relevant case law makes clear that Congress intended that 'aggrieved persons' would be solely those litigants that meet Article III standing requirements to pursue Fourth Amendment claims." Id at 5. Tellingly, defendants in their reply brief consistently refer to

1 their motion as a "summary judgment motion" and argue that
2 plaintiffs cannot sustain their burden on "summary judgment" based
3 on the allegations of the FAC. Defendants are getting ahead of
4 themselves.

5 Defendants attack plaintiffs' FAC by asserting that
6 plaintiffs seek to proceed with the lawsuit based on "reasonable
7 inferences" and "logical probabilities" but that they cannot avoid
8 summary judgment because "their evidence does not actually
9 establish that they were subject to the alleged warrantless
10 surveillance that they challenge in this case." Id at 11. At oral
11 argument, moreover, counsel for defendants contended that the only
12 way a litigant can sufficiently establish aggrieved person status
13 at the pleading stage is for the government to have admitted the
14 unlawful surveillance. Transcript of hearing held December 2,
15 2008, Doc #532 at 5-17.

16 Without a doubt, plaintiffs have alleged enough to plead
17 "aggrieved person" status so as to proceed to the next step in
18 proceedings under FISA's sections 1806(f) and 1810. While the
19 court is presented with a legal problem almost totally without
20 directly relevant precedents, to find plaintiffs' showing
21 inadequate would effectively render those provisions of FISA
22 without effect, an outcome the court is required to attempt to
23 avoid. See In re National Security Agency, 564 F Supp 2d at 1135
24 ("While the court must not interpret and apply FISA in way that
25 renders section 1810 superfluous, Dole Food Co v Patrickson, 538 US
26 468, 476-77, 123 S Ct 1655 (2003), the court must be wary of
27 unwarranted interpretations of FISA that would make section 1810 a
28 more robust remedy than Congress intended it to be.") More

1 importantly, moreover, plaintiffs' showing is legally sufficient
2 under the analogous principles set forth in Alter and In re Sealed
3 Case.

4
5 IV

6 Because plaintiffs have succeeded in alleging that they
7 are "aggrieved persons" under FISA, their request under § 1806(f)
8 is timely. Section 1806(f), discussed at some length in the
9 court's July 2 order (564 F Supp at 1131), is as follows:

10 Whenever a court or other authority is notified
11 pursuant to subsection (c) or (d) of this section, or
12 whenever a motion is made pursuant to subsection (e) of
13 this section, or whenever any motion or request is made
14 by an aggrieved person pursuant to any other statute or
15 rule of the United States or any State before any court
16 or other authority of the United States or any State to
17 discover or obtain applications or orders or other
18 materials relating to electronic surveillance or to
19 discover, obtain, or suppress evidence or information
20 obtained or derived from electronic surveillance under
21 this chapter, the United States district court or,
22 where the motion is made before another authority, the
23 United States district court in the same district as
24 the authority, shall, notwithstanding any other law, if
25 the Attorney General files an affidavit under oath that
26 disclosure or an adversary hearing would harm the
27 national security of the United States, review in
28 camera and ex parte the application, order, and such
other materials relating to the surveillance as may be
necessary to determine whether the surveillance of the
aggrieved person was lawfully authorized and conducted.
In making this determination, the court may disclose to
the aggrieved person, under appropriate security
procedures and protective orders, portions of the
application, order, or other materials relating to the
surveillance only where such disclosure is necessary to
make an accurate determination of the legality of the
surveillance.

Plaintiffs propose several approaches for the court to
allow plaintiffs to discover information about the legality of the
electronic surveillance under § 1806(f):

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(1) allow plaintiffs to examine a redacted version of the Sealed Document that allows them to see anything indicating whether defendants intercepted plaintiffs' international telecommunications in March and April of 2004 and lacked a warrant to do so;

(2) impose a protective order prohibiting disclosure of any of the Sealed Document's contents;

(3) one or more of plaintiffs' counsel may obtain security clearances prior to examining the Sealed Document (plaintiffs note that precedent exists for this approach, pointing to attorneys at the Center for Constitutional Rights who are involved in Guantanamo Bay detention litigation and attaching the declaration of one such attorney, Shayana Kadidal, describing the process of obtaining Top Secret/Sensitive Compartmented Information ("TS/SCI") clearance for work on those cases (Doc #472-8/46-8)); and

(4) because they have already seen the Sealed Document, plaintiffs' need would be satisfied by the court "simply acknowledging [its] existence and permitting [plaintiffs] to access portions of it and then reference it — e g, in a sealed memorandum of points and authorities — in our arguments on subsequent proceedings to determine plaintiffs' standing.

Doc # 472/46 at 27.

In their opposition, defendants do not fully engage with plaintiffs' motion, but rather seem to hold themselves aloof from it:

[A]side from the fact that plaintiffs have failed to establish their standing to proceed as "aggrieved persons" under the FISA, their motion should also be denied because Section 1806(f) does not apply in this case — and should not be applied — for all the reasons previously set forth by the Government. Specifically, the Government holds to its position that Section 1806(f) of the FISA does not preempt the state secrets privilege, but applies solely where the Government has acknowledged the existence of surveillance in proceedings where the lawfulness of evidence being used against someone is at issue.

Doc #499/51 at 24. Defendants have not lodged classified declarations with their opposition as seems to be called for by § 1806(f) upon the filing of a motion or request by an aggrieved

1 person. Defendants, rather, assert that

2 The discretion to invoke Section 1806(f) belongs to the
3 Attorney General, and under the present circumstances —
4 where there has been no final determination that those
5 procedures apply in this case to overcome the
6 Government's successful assertion of privilege and where
7 serious harm to national security is at stake — the
8 Attorney General has not done so. Section 1806(f) does
9 not grant the Court jurisdiction to invoke those
10 procedures on its own to decide a claim or grant a
11 moving party access to classified information, and any
12 such proceedings would raise would raise serious
13 constitutional concerns.

14 Id at 26-27, citing Department of the Navy v Egan, 484 US 518, 529
15 (1988) for the proposition that "the protection of national security
16 information lies within the discretion of the President under
17 Article II)." Of note, the court specifically rejected this very
18 reading of Egan in its July 2 order. See 564 F Supp 2d at 1121.

19 Defendants simply continue to insist that § 1806(f)
20 discovery may not be used to litigate the issue of standing; rather,
21 they argue, plaintiffs have failed to establish their "Article III
22 standing" and their case must now be dismissed. But defendants'
23 contention that plaintiffs must prove more than they have in order
24 to avail themselves of section 1806(f) conflicts with the express
25 primary purpose of in camera review under § 1806(f): "to determine
26 whether the surveillance of the aggrieved person was lawfully
27 authorized and conducted." § 1806(f).

28 In reply, plaintiffs call attention to the circular nature
of the government's position on their motion:

 Do defendants mean to assert their theory of unfettered
 presidential power over matters of national security —
 the very theory plaintiffs seek to challenge in this
 case — as a basis for disregarding this court's FISA
 preemption ruling and defying the current access
 proceedings under section 1806(f)? So it seems.

1 Doc #515/53 at 17. So it seems to the court also.

2 It appears from defendants' response to plaintiffs' motion
3 that defendants believe they can prevent the court from taking any
4 action under 1806(f) by simply declining to act.

5 But the statute is more logically susceptible to another,
6 plainer reading: the occurrence of the action by the Attorney
7 General described in the clause beginning with "if" makes mandatory
8 on the district court (as signaled by the verb "shall") the in
9 camera/ex parte review provided for in the rest of the sentence.
10 The non-occurrence of the Attorney General's action does not
11 necessarily stop the process in its tracks as defendants seem to
12 contend. Rather, a more plausible reading is that it leaves the
13 court free to order discovery of the materials or information sought
14 by the "aggrieved person" in whatever manner it deems consistent
15 with section 1806(f)'s text and purpose. Nothing in the statute
16 prohibits the court from exercising its discretion to conduct an in
17 camera/ex parte review following the plaintiff's motion and entering
18 other orders appropriate to advance the litigation if the Attorney
19 General declines to act.

20
21 V

22 For the reasons stated herein, defendants' motion to
23 dismiss or, in the alternative, for summary judgment (Doc #475/49),
24 is DENIED. Plaintiffs' motion pursuant to 50 USC § 1806(f) is
25 GRANTED (Doc #472/46).

26 The court has carefully considered the logistical
27 problems and process concerns that attend considering classified
28 evidence and issuing rulings based thereon. Measures necessary to

1 limit the disclosure of classified or other secret evidence must in
2 some manner restrict the participation of parties who do not
3 control the secret evidence and of the press and the public at
4 large. The court's next steps will prioritize two interests:
5 protecting classified evidence from disclosure and enabling
6 plaintiffs to prosecute their action. Unfortunately, the important
7 interests of the press and the public in this case cannot be given
8 equal priority without compromising the other interests.

9 To be more specific, the court will review the Sealed
10 Document *ex parte* and *in camera*. The court will then issue an
11 order regarding whether plaintiffs may proceed — that is, whether
12 the Sealed Document establishes that plaintiffs were subject to
13 electronic surveillance not authorized by FISA. As the court
14 understands its obligation with regard to classified materials,
15 only by placing and maintaining some or all of its future orders in
16 this case under seal may the court avoid indirectly disclosing some
17 aspect of the Sealed Document's contents. Unless counsel for
18 plaintiffs are granted access to the court's rulings and, possibly,
19 to at least some of defendants' classified filings, however, the
20 entire remaining course of this litigation will be *ex parte*. This
21 outcome would deprive plaintiffs of due process to an extent
22 inconsistent with Congress's purpose in enacting FISA's sections
23 1806(f) and 1810. Accordingly, this order provides for members of
24 plaintiffs' litigation team to obtain the security clearances
25 necessary to be able to litigate the case, including, but not
26 limited to, reading and responding to the court's future orders.

27 Given the difficulties attendant to the use of classified
28 material in litigation, it is timely at this juncture for

1 defendants to review their classified submissions to date in this
2 litigation and to determine whether the Sealed Document and/or any
3 of defendants' classified submissions may now be declassified.
4 Accordingly, the court now directs defendants to undertake such a
5 review.

6 The next steps in this case will be as follows:

7 1. Within fourteen (14) days of the date of this order,
8 defendants shall arrange for the court security officer/security
9 specialist assigned to this case in the Litigation Security Section
10 of the United States Department of Justice to make the Sealed
11 Document available for the court's in camera review. If the Sealed
12 Document has been included in any previous classified filing in
13 this matter, defendants shall so indicate in a letter to the court.

14 2. Defendants shall arrange for Jon B Eisenberg, lead
15 attorney for plaintiffs herein and up to two additional members of
16 plaintiffs' litigation team to apply for TS/SCI clearance and shall
17 expedite the processing of such clearances so as to complete them
18 no later than Friday, February 13, 2009. Defendants shall
19 authorize the court security officer/security specialist referred
20 to in paragraph 1 to keep the court apprised of the status of these
21 clearances. Failure to comply fully and in good faith with the
22 requirements of this paragraph will result in an order to show
23 cause re: sanctions.

24 3. Defendants shall review the Sealed Document and their
25 classified submissions to date in this litigation and determine
26 whether the Sealed Document and/or any of defendants' classified
27 submissions may be declassified, take all necessary steps to
28 declassify those that they have determined may be declassified and,

1 no later than forty-five (45) days from the date of this order,
2 serve and file a report of the outcome of that review.

3 4. The parties shall appear for a further case
4 management conference on a date to be determined by the deputy
5 clerk within the month of January 2009. Counsel should be prepared
6 to discuss adjudication of any and all issues that may be conducted
7 without resort to classified information, as well as those issues
8 that may require such information. Counsel shall, after
9 conferring, submit brief statements of their respective plans or a
10 joint plan, if they agree to one.

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12 IT IS SO ORDERED.

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16 VAUGHN R WALKER
17 United States District Chief Judge
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